

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

WHOLE FOODS MARKET GROUP, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-cv-01079-RCL
	)	
WICAL LIMITED PARTNERSHIP,	)	
	)	
Defendant.	)	

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff, Whole Foods Market Group, Inc. ("Whole Foods"), by and through its undersigned counsel, and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and Local Rule LCvR 7(h), moves for partial summary judgment as to liability on Counts I, II, III, and IV of its amended complaint. In support, Whole Foods states as follows:

1. Whole Foods filed a four-count First Amended Verified Complaint (**Exhibit A**) for Declaratory Judgment, Injunctive Relief, and Breach of Contract with respect to a Lease Agreement dated March 10, 1994 relating to its grocery store located at 2321 Wisconsin Ave., NW, Washington, D.C. 20007.
2. Defendant filed its Answer and Affirmative Defenses (**Exhibit B**).
3. The parties have engaged in written, oral, and expert discovery.
4. There are no genuine issues of material fact relating to Defendant's liability on any of the counts of Plaintiff's amended complaint, and Whole Foods is entitled to judgment as a matter of law on those counts.
5. As set forth in detail in Whole Foods' Statement of Material Facts as to Which There is No Genuine Issue and its Memorandum in Support of its Motion for Partial Summary Judgment filed herewith, Whole Foods was required to close and entirely rebuild and refinish the

interior of the Store due to a pervasive rodent infestation problem arising in large part from the recent explosion in rodent populations in D.C., what became an obsolete building design which had a suspended and insulated drop ceiling providing rodent harborage beneath the entire floor space beneath the sales floor, and activities on adjacent properties, all of which are beyond the control of Whole Foods. Because of the nature of the required rebuild and District of Columbia permitting timeframes, it is not possible to complete the rebuild and reopen the Store within 60 days. Defendant has also withheld necessary consents to Whole Foods' permit application, issued a baseless Notice of Default, and threatened to terminate the lease, all in an admitted attempt to coerce rent payments beyond those to which it is entitled under the lease.

**PRAYER FOR RELIEF**

WHEREFORE, for the reasons set forth above and in Plaintiff's accompanying Memorandum, Plaintiff Whole Foods Market Group, Inc. respectfully requests that this Court grant this Motion for Partial Summary Judgment on Counts I, II, III, and IV of Plaintiff's Amended Complaint, and grant the following relief:

- (a) Grant judgment in favor of Plaintiff and against Defendant as to liability on Counts I, II, III, and IV of Plaintiff's Amended Complaint;
- (b) Declare that Whole Foods's Lease with Defendant is valid and binding;
- (c) Declare that Plaintiff's extended closure beyond 60 days is excused pursuant to Paragraph 30(A) of the Lease;
- (d) Declare that Defendant's attempt to use Whole Foods' need to rebuild the store to extract additional rent is a breach of the Lease, beginning with the Notice of Default issued on May 15, 2017 and continuing with Defendant's ongoing refusal to consent to Plaintiff's submittal of its permit application to D.C.;

- (e) Declare that, as a result of Defendant's breach, the Lease is terminable, at Whole Foods' option, with an effective termination date of May 15, 2017;
- (f) Order Defendant to consent to Plaintiff's permit application to the District;
- (g) Declare that Whole Foods is entitled to reimbursement of all rents paid since May 15, 2017 through the time Defendant consents to Whole Foods' permit application;
- (h) Declare that Whole Foods is entitled to lost profits, reimbursement of property upkeep costs, and pre-judgment interest in an amount to be determined at trial;
- (i) Declare that Whole Foods is entitled to attorney's fees and costs pursuant to Paragraph 18(C) of the Lease, in an amount to be calculated at the conclusion of this proceeding; and
- (j) Grant such other and further relief as this Court deems just and appropriate.

**ORAL HEARING REQUESTED**

Pursuant to Local Rule 78.1, Whole Foods requests an oral hearing on this Motion.

Date: June 28, 2019

Respectfully submitted,

WHOLE FOODS MARKET GROUP, INC.

By: /s/ Norman B. Berger  
One of its attorneys

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*Counsel for the Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that, on June 28, 2019, the foregoing *Plaintiff Motion for Summary Judgment* was filed electronically in the Electronic Case Filing system and service accomplished pursuant to ECF to counsel of record.

By: /s/ Norman B. Berger

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**WHOLE FOODS MARKET GROUP, INC. v. WICAL LIMITED PARTNERSHIP**  
**CIVIL ACTION NO. 17-CV-01079-RCL**

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT:**

**EXHIBIT LIST**

A	Plaintiff Whole Foods' First Amended Verified Complaint (8/4/2017)
B	Defendant Wical's Answer and Affirmative Defenses (2/6/2018)
C <sup>2</sup>	Transcript of Deposition of Scott Ogden (2/26/2019) <sup>1</sup> C-9: Email from Scott Ogden to Norah Smith dated March 29, 2017 C-10: Letter dated April 5, 2017 from Sylvan Herman and Scott Ogden to from Scott Allshouse C-11: Letter dated April 9, 2017 from Richard Levin to Scott Allshouse C-12: Notice of Default dated May 15, 2017 from Richard Levin to Scott Allshouse C-13: Email string dated May 26, 2017 between Scott Ogden and Mark Hughes C-14: Letter dated July 14, 2017 to Sylvan Herman and Scott Ogden from Scott Allshouse C-17: Email from Scott Ogden to Scott Allshouse dated April 2, 2017 C-18: Email string between Brad Buslik and Scott Ogden dated May 10, 2017 C-19: Email dated March 31, 2017 from Scott Ogden to Steve Shaw C-20: Email string from Scott Ogden to Kenneth Hostetter dated March 31, 2017 C-21: Email dated March 21, 2017 from Scott Ogden to Kenneth Hostetter C-25: Letter dated April 13, 2018 to D.C. Dept. of Consumer & Regulatory Affairs from Scott Ogden with Vacant Building Response Form C-26: Email string dated May 12, 2018 from Keri Brown to Ken Hostetter C-29: Email string dated April 2, 2018 from Scott Ogden to Mark Hughes
D <sup>2</sup>	Transcript of Deposition of Sylvan Herman (4/24/2019) <sup>1</sup> D-1: Lease Agreement (& related documents) dated March 10, 1994
E <sup>2</sup>	Transcript of Deposition of Anthony Luke Real, Designated Representative of O'Barr Construction (12/5/2018) <sup>1</sup> E-2: Email dated February 13, 2017 from John Fluhart to Luke real, et. al E-11: Email from James Kucha to Ryan Real dated April 7, 2017
F <sup>2</sup>	Transcript of Deposition of Scott Allshouse (2/27/2019) <sup>1</sup>
G <sup>2</sup>	Transcript of Deposition of Mark Hughes (2/25/2019) <sup>1</sup> G-8: Email string from Mark McAfee to Mark Hughes et. al dated May 22, 2017 G-9: Email string between Scott Ogden and Mark Hughes dated May 26, 2017 G-10: Letter from Mark Hughes to Scott Ogden dated July 5, 2017 G-12: Email from Heather Smith to Scott Allshouse dated May 15, 2017 G-16: Email from Neil Andrews to Scott Allshouse and Mark Hughes dated April 6, 2017 G-17: Email string between Neil Andrews, Mark Hughes, Scott Allshouse et. al dated November 17, 2017
H <sup>2</sup>	Transcript of Deposition of Derek Gruber (3/18/2019) <sup>1</sup>
I <sup>2</sup>	Expert Report by Dr. Richard Kramer (1/29/19)
J <sup>2</sup>	Transcript of Deposition of Dr. Richard Kramer (5/17/2019) <sup>1</sup>
K <sup>2</sup>	Expert Report by Dr. Godfrey Nalyanya (2/28/19)
L <sup>2</sup>	Transcript of Deposition of Dr. Godfrey Nalyanya (5/20/2019) <sup>1</sup> L-11: Email from Kyle Broda to various Whole Foods employees dated March 14, 2017
M <sup>2</sup>	Expert Report by John I. Frankhouser, III, P.E. (2/27/2019)
N	FOIA Request from D.C. Department of Health, Edward Rich, Office of General Counsel (6/21/2019)
O	D.C. Department of Health Inspection Reports (1/25/2017, 2/8/2017, 2/9/2017, 2/10/2017, 3/8/2017, 3/13/2017, 3/15/2017)

<sup>1</sup> Note: All pages of the referenced deposition transcripts are included for completeness and context. However, due to the voluminous nature of the deposition exhibits, only those referenced in the Motion and Memorandum are included as listed above. Plaintiff can provide additional deposition exhibits to the Court upon request.

<sup>2</sup> Note: Exhibits and all subparts thereto are being filed under seal pursuant to the Court's Protective Order (ECF 59), which was jointly requested by the parties (ECF 58), pursuant to a Motion to Seal filed herewith.